UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

SYSCO GRAND RAPIDS LLC, Respondent and GENERAL TEAMSTERS LOCAL UNION NO. 406, INTERNATIONAL BROTHERHOOD OF TEAMSTERS (IBT) Charging Party	:	Cases 07-CA-197034 07-CA-206108 07-CA-206109

BRIEF OF SYSCO GRAND RAPIDS LLC

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This is the post-hearing brief of Sysco Grand Rapids LLC ("Respondent" or "Sysco Grand Rapids"). On September 26 and October 18, 2018 Administrative Law Judge David I. Goldman heard evidence regarding three allegations of the General Counsel against Sysco Grand Rapids. Upon the evidence, and for reasons stated below, it is clear that Sysco Grand Rapids did not violate the Act.

FACTS

A. Procedural Status

The original complaint in this matter was issued by Region 7 on August 31, 2017. On June 21, 2018, the Region issued an amended complaint. During the evidentiary hearing, the GC amended ¶ 12 of the amended complaint.[1] [GC-3]. At the conclusion of the hearing, the GC moved to withdraw ¶ 10 of the Region's amended complaint and that motion was granted without objection. [T. pp. 330-331].

As such, the only two allegations currently at issue are ¶ 11 as iterated in the June 21, 2018 complaint and ¶ 12 as iterated in GC-3.

B. Facts

Sysco Grand Rapids is in the food service business. [T. p. 175]. It transports food to various businesses and public institutions primarily in Western Michigan. [Id.] Sysco Grand Rapids maintains a "depot" in Alanson, Michigan. [T. 269]. The depot is a yard where drivers bring trailers loaded with food from its warehouse in Grand Rapids to Alanson, where the trailers are attached to tractors and the food is supplied to Sysco

[1] References to the Exhibits of Respondent and the General Counsel are designated as "R-#" and "GC-#" respectively, with the corresponding Exhibit number. References to the transcript are designated at "T. #," with the corresponding page number.

Grand Rapids' customers. [T. p. 270]. The depot also has a small structure on the property. [Id.] Alanson is located approximately 240 miles north of Grand Rapids. [Id.]

The GC has alleged that in August 2017 the Respondent committed two unfair labor practices through its lead driver Kevin Lauer at the Alanson depot. [GC-1(nn) ¶ 11; and GC-3 ¶ 12].

Paragraph 11

Paragraph 11 alleges:

> About August 2017, Respondent by its agent Kevin Lauer, at its Alanson facility, implicitly threatened that it would enforce its rules more strictly because of the Charging Party's status as the exclusive collective representative at its Michigan facilities.

There was no evidence that the Charging Party was the exclusive collective bargaining agent of the employees at Sysco Grand Rapids in August 2017.

In support of this allegation, the GC presented Sysco Grand Rapids employee Mike Evoy. Mr. Evoy testified that in August 2017, he brought a union flyer to the Alanson depot. [T. pp. 36-37; GC-2]. The union flyer – bright pink in color – motivated a discussion in the depot about the Union. [T. pp. 38-39]. Mr. Evoy testified that he, Kevin Lauer, temporary employee Doug Schlappi and temporary employee Aaron Vorac participated in the discussion. [T. p. 40]. Mr. Evoy did not initially testify that Dean Enos was present for the discussion, but then later testified he was present. [T. p. 40; p. 52]. Mr. Schlappi offered his opinion on unions (as enabling poor performing employees) [T. pp. 41-42] and that Mr. Lauer stated that "the company" was likely to work with him if Mr. Evoy was ever subject to discipline because Mr. Evoy "bust(ed) his ass." [T. p. 42]. According to Mr. Evoy, Mr. Lauer also mentioned that a former employee, Mark Larson,

had "busted his ass" doing his job, but he was fired along with two other employees because "if they [Sysco Grand Rapids] would have kept him and not the other two, then the Union would have made a deal out of it because everybody wasn't being treated the same." [T. p. 43]. Mr. Evoy said he felt everyone "should have equal treatment" and "a policy should be applied to everybody equally." [Id.] Notably, Mr. Evoy did not testify to any discussion about how Sysco Grand Rapids' rules, policies and procedures would be enforced if Sysco Grand Rapids was unionized. [T. pp. 33-36].

Mr. Evoy also testified that on October 11, 2017, two months after the alleged discussion, he testified by affidavit to a National Labor Relations Board agent that Messrs. Lauer, Vorac and Schlappi were at the meeting, but he did not include Mr. Enos, whom he testified was present while on the witness stand. [T. p. 52]. Mr. Evoy testified that two months after the incident he did not want to "guess" or "speculate" Mr. Enos was present. [T. p. 53]. He then recanted earlier testimony and testified he did not specifically remember Mr. Enos as being present. [Id.]

Mr. Enos, however, testified he was present at a meeting with Messrs. Lauer, Evoy, Schlappi and Vorac. [T. pp. 77-78]. In his version, Mr. Enos testified:

> "... there was a discussion ... about how the Unions don't ever do anything for people, how we're all wasting our time."

[T. p. 77]. However, Mr. Enos did not testify as to who specifically commented about unions in the discussion; i.e., whether it was Mr. Lauer, Mr. Schlappi, Mr. Vorac or Mr. Evoy. [T. pp. 77-78]

It is plain that Mr. Enos was testifying about Mr. Schlappi's comments about unions, and not Mr. Lauer's with regard to whether unions assist employees. Mr. Schlappi was, in August 2017, a statutory employee of PMP, and not a supervisor or

agent of Sysco Grand Rapids. Indeed, he is not alleged as such in the Region's complaint. Mr. Schlappi testified he had no recollection of ever seeing the bright pink union flyer [T. p. 263], but he recalled a discussion with Mr. Lauer and Mr. Enos in the summer of 2017 where the Union was being discussed. Mr. Schlappi, similarly, was not sure if Mr. Enos was present. [T. p. 263]. Mr. Schlappi testified that he told Mr. Lauer and Mr. Evoy that he and his co-workers had been in a Union at a bus garage but they "dropped them" because they "didn't do me any good." [T. pp. 263-264]. Mr. Schlappi also testified Mr. Larson was never mentioned in the conversation. [T. p. 264].

Mr. Lauer confirmed the truth of Mr. Schlappi's testimony. [T. p. 290]. Mr. Lauer, similarly, did not recall Mr. Enos being present for the discussion. [T. p. 289-290]. Mr. Lauer denied he ever offered his opinion to Mr. Evoy about the likelihood of his being disciplined if he "bust his ass" at work, and he denied ever speaking to Mr. Evoy about Mr. Larson. [T. p. 290].

Paragraph 12

In paragraph 12, the GC alleges:

> About August 20, 2017, Respondent by its agent Kevin Lauer, at its Alanson facility interfered with employees' Section 7 rights by implicitly threatening employees with reprisals, including changing their work schedules because of the Charging Party's status as the exclusive collective bargaining representative at its Michigan facilities and in order to discourage union activities or membership.

[GC-3].

There was no evidence presented that the Charging Party is the exclusive bargaining representative of Sysco Grand Rapids.

In support of the allegation the GC presented Mr. Enos. Mr. Enos testified he wore a Teamsters hat, as did fellow Alanson drivers Mr. Evoy, Harley Vaughn and

Jesse Silva. [T. p. 68, 91]. Mr. Enos testified that he and Mr. Lauer were smoking in the parking lot of the depot. [T. p. 70]. Mr. Enos and Mr. Lauer were joined by a temporary employee named Jon Ware[2] who asked Mr. Lauer "why (does Mr. Enos) always get the Friday nights, meaning the sixth day" and Mr. Enos responded, "Because I was an employee I got time before the temps did." [T. p. 70]. Mr. Lauer told him that "actually I (Mr. Enos) had a day off in the middle of the week the following week." [Id.] Mr. Enos claims he asked Mr. Lauer "why" and Mr. Lauer stated "it's winding down, you know, hours are coming down." [T. p. 71]. Mr. Enos claims he protested and asked, "Why am I getting a day off in the middle of the week instead of having a **full day weekend**?" [Id.] Mr. Enos concluded "and that's when he mentioned the hat I'd been wearing (the Teamsters hat)," and stated that's why his hours were decreasing. [T. p. 71].

Mr. Ware is not an employee of Sysco Grand Rapids at this time or at any time. [T. p. 250]. He was a driver for PMP assigned to the Alanson depot of Sysco Grand Rapids in the summer of 2017, where he worked with Mr. Enos. [T. pp. 251-252]. Mr. Ware testified he had requested the night of Friday, September 2, 2017 off of work to go on a camping trip with his daughter. [T. p. 253]. Upon review of the shuttle driver schedules in the summer of 2017, it is evident that Mr. Enos had Monday, August 29, 2017 scheduled off, and Mr. Ware had Friday, September 2, 2017 scheduled off while Mr. Enos was scheduled to work that Friday. [R-2, R-2688]. However, Mr. Ware testified he never told Mr. Enos he had asked for September 2, 2017 off – only Mr. Lauer. [Id.] In fact, Mr. Ware testified he never discussed his schedule at all with Mr. Enos, or Mr. Enos' schedule with Mr. Lauer. [T. pp. 353-354]. Mr. Ware expressly

[2] Mr. Ware was incorrectly referenced in the record as "John Ware," but his name is spelled Jonathon. [T. p. 70; p. 250]

testified that he never heard Mr. Lauer tell Mr. Enos he would not schedule Mr. Enos on a certain day because he wore a Teamsters hat. [T. p. 254].

Mr. Lauer testified Mr. Enos complained that he wanted to work six days a week, but if he could not get six days a week, he wanted to work Sunday through Thursday. [Id]. Mr. Lauer responded that the following Friday, September 2, 2017, Mr. Ware had already been given the day off to do something with his daughter. [Id.] Mr. Lauer expressly denied referencing Mr. Enos' Teamsters hat. [T. p. 294]. Rather, Mr. Lauer testified that in his initial drafts of the schedules, per Mr. Enos' request, he recommended Mr. Enos be scheduled off all of the following Friday nights that summer. [Id., See, R-2].

Although Mr. Lauer never mentioned Mr. Enos' Teamsters hat, Mr. Enos brought up his Teamsters hat to Mr. Lauer on several occasions. [T. p. 295]. Mr. Lauer testified Mr. Enos would point at it and put it in his face. [T. p. 295].

Transportation Director Todd Yocum testified that Mr. Enos complained to him that Mr. Lauer told him that he changed his schedule due to wearing a Teamsters hat. [T. p. 218]. Mr. Yocum's testimony is corroborated by a contemporaneous memo of the conversation he had with Mr. Enos on August 30, 2017. [R-5]. Mr. Yocum responded to Mr. Enos that he approved the schedule that week and that Mr. Lauer had only drafted it. [T. pp. 220-222; R-5]. Mr. Yocum felt Mr. Enos was coming to him to arrange a change to his schedule. However, Mr. Yocum checked with Mr. Lauer to see if he told Mr. Enos that he changed his schedule because of his Teamsters hat, and Mr. Lauer denied it noting Mr. Enos had brought the hat up. [T. p. 223; R-5]. Mr. Lauer also

confirmed Mr. Ware had asked for Friday September 2, 2017 off before the schedule was drafted. [T. p. 223].

In sum, Mr. Enos' story is not credible. Not only does Mr. Enos' story not make sense, but both Mr. Lauer and Mr. Ware expressly deny the encounter. Mr. Ware is not an employee of Sysco Grand Rapids, and does not have motivation not to testify truthfully. Mr. Ware asked for one Friday off to camp with his daughter, and Mr. Lauer submitted a draft schedule that Mr. Yocum approved giving Mr. Ware that day off. Mr. Enos subsequently complained, and Mr. Lauer drafted schedules giving him Friday and Saturday off through the rest of the summer. The witnesses and documentary evidence overwhelmingly establish Mr. Enos' testimony is not credible.

Supervisory Status

Finally, even if Mr. Enos had been truthful, Mr. Lauer is an employee and **not** a supervisor under the Act. Mr. Lauer is the lead driver in the Alanson depot for Sysco Grand Rapids, and has worked in the depot for 27 years. [T. p. 269]. He has been designated as the "lead" for approximately five years. [T. p. 271]. As the lead, his primary function was always to deliver food to customers as a driver – he spent four to five days a week performing only driver functions. [Id.]

Mr. Lauer has never hired Sysco Grand Rapids drivers nor has he ever interviewed applicants for Sysco Grand Rapids positions. [T. p. 272]. Mr. Lauer had a role in meeting some of the drivers that a labor contractor, PMP, leased to Sysco Grand Rapids. [T. pp. 272-273]. PMP allowed Mr. Lauer to meet prospectively with some – not all – of its employees prior to their assignment to the Alanson depot. [Id.] Mr. Lauer's role when he met with the PMP employees was to check and see if they had a

commercial driver's license (CDL), a "pulse", and if they were able to do the job. [T. p. 274]. Once he obtained this information, he communicated it to Mr. Yocum, or another supervisor, who would determine whether or not to lease the employee and bring them to Grand Rapids for orientation. [T. p. 275]. Mr. Lauer performed this function until June of 2017 and has **never** performed it since. [Id.]

Mr. Lauer has never had authority to, and has not, disciplined or terminated an employee of PMP or Sysco Grand Rapids. [T. p. 276]. Mr. Lauer composed **draft** schedules for the drivers in the four northern depots in 2017; he ceased performing this function in the spring of 2018. [T. p. 267-277]. Mr. Lauer drafted the schedule based on the most senior drivers' preferences and familiarity with the routes. [Id.] Mr. Lauer composed a draft schedule, and emailed it to either Transportation Supervisor Joe Quesenberry [T. p. 277] or Mr. Yocum. [T. p. 278]. Mr. Quesenberry and Mr. Yocum made the decision on the actual schedule, and liberally changed Mr. Lauer's draft, approximately 50% of the time. [T. pp. 278-279]. Once Mr. Quesenberry or Mr. Yocum issued the final schedule, Mr. Lauer and each lead driver in the northern depots would post it in the depot. [T. p. 279].

Mr. Lauer collected vacation requests from the drivers in the northern depots, and drafted a vacation schedule based on their requests. [T. pp. 280-281]. Mr. Lauer had no independent discretion to assign the requested vacation weeks. [T. p. 281]. Rather, Mr. Lauer was required to assign vacation weeks requested by the employees in descending order of seniority. [T. p. 281]. Mr. Lauer had no authority to resolve vacation disputes between Sysco Grand Rapids employees. [T. p. 282].

Mr. Lauer had no authority to responsibly direct his fellow drivers. His compensation was not set based on how well the other drivers performed. [T. pp. 282-283]. Rather, as a lead, he received $1 more per hour than the other drivers. [T. p. 287]. He did not receive a salary. [Id.] The lead drivers at the other Sysco Grand Rapids depots also receive $1 more per hour than the other drivers. [T. p. 288]

Mr. Lauer received "call-ins" from other employees who were unable to report to work in 2017. [T. p. 283]. Employees could also report an absence to the dispatcher in Grand Rapids, other lead drivers, management or a "call-in box." [T. p. 283]. When employees called in, Mr. Lauer would ask an employee who was designated as "on call" to fill the absence, or, he was expected to call the dispatcher to cover the absence. [T. pp. 283-284].

Mr. Lauer did not contribute to performance evaluations of other drivers. [T. p. 285]. Mr. Lauer never reviewed the performance evaluation metrics (Telogis, STS or drive-cam data). [T. pp. 209-210; 285]. Similarly, Mr. Lauer never rode along with a driver to assess the driver's performance because, simply, "he wasn't a supervisor." [T. pp. 210-211]

Mr. Lauer, and other drivers, used a common office in the small space-limited Alanson depot in 2017. [T. pp. 285-286]. Mr. Lauer used the office on occasional Tuesdays, but not every Tuesday. [T. p. 286]. On those days, he cleaned the toilet, mopped the floor, composed the draft schedule, ensured there was coffee, and ordered supplies. [T. p. 286]. As remuneration for these tasks, Mr. Lauer receives an extra $1 an hour lead pay. None of these tasks required independent judgment. Mr. Lauer was not the only driver at the Alanson depot who used the office; other drivers used the

laptop assigned to Mr. Lauer to complete online courses. [Id.] The laptop was assigned to Mr. Lauer to compose the draft schedule. [T. p. 287].

In the spring of 2018, Dennis Winter became a supervisor and was assigned to the Alanson depot, where he had been a delivery driver for many years. [T. p. 271]. After the spring of 2018, Mr. Lauer testified he has ceased meeting PMP employees before their assignment to the Sysco Grand Rapids Alanson depot [T. p. 275], and he has ceased composing the draft schedules. [T. p. 277]. Mr. Lauer's compensation did not change when Mr. Winter took over the schedule drafting and meeting with PMP employees.

Mr. Lauer testified he never identified himself as a supervisor, and no employee ever addressed him as a supervisor. [T. pp. 288-289]. Mr. Lauer testified he never applied to be a supervisor even once the position became open because he did not want to be a supervisor. [T. p. 298].

ISSUES

1. Has a preponderance of the evidence proven that Kevin Lauer is a statutory supervisor?

2. Does the evidence prove that Kevin Lauer told employees that Sysco Grand Rapids would enforce its rules more strictly if it was unionized in violation of Section 8(a)(1) of the Act?

3. Does the evidence prove that Kevin Lauer implicitly threatened Dean Enos with reprisals of changing his work schedule in violation of Section 8(a)(1) of the Act?

ARGUMENT

1. THERE IS NO EVIDENCE IN THE RECORD ESTABLISHING KEVIN LAUER WAS, OR ACTED AS, A SUPERVISOR IN AUGUST 2017.

A. The Evidence Establishes Kevin Lauer Was, And Is, A Statutory Employee.

The GC failed to establish that Kevin Lauer was a supervisor under the Act in August 2017. In fact, the GC failed to present any evidence regarding Mr. Lauer's supervisory status. Under §2(11) of the Act, an individual is a "supervisor" if the individual has "authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." [Id.] The Board's test for determining supervisory status is whether: (1) the individual has the authority to engage in any one of the twelve criteria; (2) whether the exercise of such authority requires the use of independent judgment; and (3) whether the individual holds the authority in the interest of the employer. *NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 713 (2001).

The GC, as the party asserting supervisory status, has the burden of proving supervisory status exists. *Freeman Decorating Co.*, 330 NLRB 1143, 1143 (2000) (*citing Ohio Masonic Home*, 295 NLRB 390, 393 (1989)); *Ky. River Cmty. Care, Inc.*, 532 U.S. at 710-711. Further, the GC must establish supervisory status by a preponderance of the evidence. *Bethany Med. Ctr.*, 328 NLRB 1094, 1103 (1999); *Volt Information Sciences*, 274 NLRB 308, 330 (1985). If there is a void in the record, or a lack of evidence, it must be construed against the GC, as the party asserting supervisory status. *Mich. Masonic Home*, 332 NLRB 1409 (2000). It is insufficient for the GC to attempt to establish supervisory status with mere inferences or conclusory statements. *Sears, Roebuck & Co.*, 304 NLRB 193 (1991). It is critical to hold the General Counsel

to his burden because when analyzing supervisory status, the Board has "a duty not to construe the statutory language too broadly because the individual found to be a supervisor is denied employee rights protected under the Act." *St Francis Med. Ctr.-W.*, 323 NLRB 1046 (1997); *Freeman Decorating Co.*, 330 NLRB 1143-1144 (2000).

Here, as established in more detail below, the GC has utterly failed to establish his burden. Instead, he relied entirely upon his own overruled claim that some employees had testified that to their knowledge, Mr. Lauer's duties had not changed from the time relevant in the Rosas decision until August 2017. That is not true, as Mr. Lauer ceased meeting with PMP employees in the late spring of 2017. More importantly, the GC was put on notice on September 26, 2018 that the ALJ would hear "new evidence, both in time and quality" regarding Mr. Lauer's supervisory status. Yet, even with a month break between the first and second day of the hearing, ample time to prepare testimony, the GC failed to present <u>any</u> evidence with regard to Mr. Lauer's supervisory status. Instead of soliciting evidence from his witnesses, he merely asked each witness about Mr. Lauer's length of time in the lead driver and whether to their knowledge his duties have changed during that time. However, these conclusory statements fail to establish that Mr. Lauer was a supervisor in August, 2017, and as such, the GC himself is baselessly denying Mr. Lauer his statutorily protected rights under the Act.

(i) Authority to Hire

The GC presented no evidence, and has never presented evidence, that Mr. Lauer has the authority to hire Sysco Grand Rapids employees. Rather, in cross-examination, the GC focused on Mr. Lauer's role meeting with PMP employees prior to

their assignment to the Alanson depot. However, those meetings were limited to a "meet and greet," where Mr. Lauer would check to make sure prospective temporary employees had a commercial driver's license (CDL), and would not show up to work drunk or late. [T. p. 216]. As Mr. Lauer described the meetings, he would check if the driver had a CDL, a doubles endorsement to carry two trailers, and a pulse. [T. pp. 274-275]. Then he would refer the driver to supervisors at Grand Rapids to determine whether their services should be leased. [T. p. 275].

First, as a threshold matter, in order to establish that an individual has supervisory authority based on hiring, the GC must establish that the individual had hiring authority over the employees of the employer at issue, and not the employees of another employer, such as a contractor or a temporary agency. *Franklin Hosp. Med Ctr*, 337 NLRB 826 fn. 2 (2002); *Crenulated Co.*, 308 NLRB 1216 (1992); *Fleet Transport Co.*, 196 NLRB 436, 438 fn. 6 (1972); *Eureka Newspapers, Inc.*, 154 NLRB 1181, 1185 (1965). In *Washington Post Company*, the Board declined to find an employee with the title of supervisor of accounts receivable to be a supervisor under the Act. The employee performed the daily functions of the rest of the accounts receivable department, but would sporadically interview temporary employees. The Board noted that "sporadic hiring and terminating of temporaries does not convert a rank-and-file employee to a statutory supervisor." *Wash. Post. Co.*, 254 NLRB 168, 193 (1981); see also *Getronics USA*, 2008 NLRB LEXIS 412 (ALJD 2008) (employee who recommended the hire of two temporary employees was not a statutory supervisor because temporary employees were not employed by the employer at issue).

Here, most fundamentally, there is no evidence Mr. Lauer ever interviewed, recommended or had any role in hiring any employee of **Sysco Grand Rapids**. The only employees at issue were employees of PMP. This, in itself, establishes he had no authority to hire under the Act. Additionally, like in *Washington Post Company*, Mr. Lauer performed the duties of other drivers four to five days a week. His occasional, sporadic discussions with contract workers does not convert him into a statutory supervisor.

Further, the Board has required that an exercise of statutory authority requires that a potential supervisor make the hiring determination, and not merely screen potential applicants. *Browne of Houston*, 280 NLRB 1222, 1223 (1986); *J.C. Penney Corp.,* 347 NLRB 127 (2006). For example, in *Wake Electric Membership Corp.*, the Board found that a human resources administrator who narrowed the pool of applicants by screening them and recommending several to the department head, who ultimately decided which, if any, were hired, did not actually make hiring recommendations. *Wake Electric Membership Corp.*, 338 NLRB No. 32 (2002); *Ohio State Legal Services Assn.*, 239 NLRB 594 (1978); *The Door*, 297 NLRB 601 (1990). Similarly, here, Mr. Lauer screened the PMP employees to make sure they could perform the basic functions of the job, and then referred them to a supervisor in Grand Rapids. Mr. Lauer did not ultimately make the leasing, much less hiring, decision.

Any authority to hire must also include independent judgment. In *UPS Ground Freight*, the Board found that a dispatcher who conducted drivers' tests for applicants did not possess the statutory authority to hire. The tests were designed to determine the competence of potential new hires, and after administering the tests, he reported to

management whether the driver passed or failed. Management used the test results and not a recommendation to determine whether an applicant should be hired. *UPS Ground Freight*, 365 NLRB No. 113 (2017). Similarly, Mr. Lauer checked whether contractor's employees had a CDL, doubles endorsement and a pulse. Once he made that determination, he conveyed the results to supervisors in Grand Rapids, who made the ultimate decision whether to lease the contractor's employees.

Here, the evidence is that, with regard to PMP's employees, Mr. Lauer met with some – not all – and either personally or by telephone, to verify the employees had a CDL, a pulse, and could to the job of a delivery driver up to **June** of 2017 and no further. Therefore, at most, the employees of PMP Mr. Lauer met with were "screened" to determine if they had a CDL, a pulse and could work with knowledge of what the job entailed. No individual judgment was exercised as Mr. Lauer merely conveyed these basic assessments to his supervisor who either determined to bring the PMP employees to Grand Rapids for an orientation – or not. Finally, in August of 2017, he did not even perform this function and has not since June of 2017. Accordingly, the General Counsel did not establish that Mr. Lauer had the statutory authority to hire.

(ii) Vacation Scheduling

Mr. Lauer collected vacation requests from employees in the northern depots and then recorded vacation dates solely on the basis of the employees' seniority. Mr. Lauer signed two of the requests on the only line available on the form (which was demarcated supervisor), to indicate that he received the request. Additionally, out of convenience, Mr. Lauer has accepted calls from employees reporting an unscheduled

absence, which he then conveyed to Grand Rapids. Employees also could call other lead drivers, management, a dispatcher, and a voice mail box number.

Scheduling of vacations and absences is not a supervisory function if the tasks are carried out within relatively fixed parameters established by management as their performance is routine. *Azura Ranch Market*, 321 NLRB 811 (1996); *Quadrex Environmental Co.*, 308 NLRB 101 (1992). In *Dico Tire*, the Board refused to find a maintenance employee to be a statutory supervisor even though he approved two 1-day vacation requests and employees reported to him when they were going to be absent. The Board found his responsibility to be a clerical function and noted that there was no evidence in the record to indicate that he exercised independent judgment or any discretion to refuse to sign vacation forms if the requested dates were within established parameters. *Dico Tire*, 330 NLRB 1252 (2000); see also *Fleming Cos.*, 330 NLRB 277, 280 (1999); *North Shore Weeklies*, 317 NLRB 1128, 1130 (1995).

Here, similar to *Dico* Tire, Mr. Lauer merely accepted vacation requests and recorded vacation dates as requested by the most senior employees in descending order. Mr. Lauer had no discretion to vary from the simple formula and the GC presented no evidence he did so. Even had he "approved" such requests, it would be a mere clerical function – as was his receipt of absence call-ins – and would not evidence a supervisory function.

(iii) Authority to Discharge

There was no evidence that Mr. Lauer had authority to terminate or actually terminated any employees – either from Sysco Grand Rapids or PMP.

(iv) Authority to Assign

Mr. Lauer did not have the authority to assign. Mr. Lauer's preparation of draft schedules, which were reviewed and frequently changed by supervisors in Grand Rapids do not meet the statutory indicia of assignment or responsibly direct. The Board has noted that where "there is only one obvious and self-evident choice [...] then the assignment is routine or clerical in nature and does not implicate independent judgment, even if it is made free of the control of others and involves forming an opinion or evaluation by discerning and comparing data." *Oakwood Healthcare, Inc.*, 348 NLRB 686, 693 (2006); see also *Cook Inlet Tug & Barge, Inc.*, 362 NLRB No. 111, slip op. at 1 (2015); *SR-73 & Lakeside Ave Operations LLC*, 2017 NLRB LEXIS 425 (2017).

Additionally, the Board has noted that assigning employees according to their known skills is not evidence of independent judgment. *Shaw, Inc.*, 350 NLRB 354 (2007); *Volair Contractors, Inc.*, 341 NLRB 673, 675 fn. 10 (2004); *S.D.I. Operating Partners, L.P.*, 321 NLRB 111 (1996); *Brown & Root, Inc.*, 314 NLRB 19, 21-22 (1994). Routine employee scheduling that does not require independent judgment does not impute statutory authority. In *Sears, Roebuck & Co.*, the Board found that an employee who prepared the weekly schedules did not have supervisory authority. The employee was given the number of sales employees to cover the selling floor daily and the number of hours a week each employee would work. *Sears, Roebuck & Co.*, 304 NLRB 193 (1991); see also *Fremong Medical Ctr.*, 357 NLRB No. 158 (2011) (preparation of monthly staff schedules does not itself constitute the exercise of independent judgment); *Pacific Coast M.S. Indus.*, 355 NLRB No. 226 (2010) (team leaders who sporadically created work schedules did not exercise independent judgment because

they did not take into account relative skill and it was based on a predetermined schedule); *El Paso Elec. Co.*, 350 NLRB 151, 162 (2007) (Board found employee not to be a statutory supervisor because no evidence she independently devised work plans rather than following a system prescribed by the employer); *Wash. Post Co.*, 254 NLRB 168 (1981) (employees who set schedules were not supervisors under the Act). Similarly, here, Mr. Lauer had a set number of drivers out of the depot, and he arranged the set number of drivers to the set number of routes. Mr. Lauer based his decision based on the driver's preference and familiarity with the route. Further, as Mr. Evoy testified, the schedules do not vary much from week to week. Accordingly, Mr. Lauer's task was routine in nature and did not confer supervisory status.

In *Atlantic Paratrans of New York City*, the Second Circuit upheld the Board's determination that dispatchers did not exercise "independent judgment" in assigning drivers to their routes. The Board noted that the large majority of routes and trips are preassigned by parties other than the dispatchers. When a minority of trips must be reassigned based on unforeseen factors such as the addition of new trips, weather, and traffic delays, the dispatcher considers mechanical and geographical factors. The Second Circuit determined that dispatchers perform the mechanical task of matching available drivers to required trips, and do not evaluate the qualifications of the drivers. *NLRB v. Atl. Paratrans. of N.Y.C., Inc.*, 300 Fed. Appx. 54 (2d Cir. 2008) (enforcing *Atl. Paratrans. of N.Y.C., Inc.*, 349 NLRB No. 44 (2007)); see also *NLRB v. Meenan Oil Co., L.P.*, 139 F.3d 311, 321 (2d Cir. 1998) ("In assigning routes to drivers, the dispatchers consider the orders' relative priority and efficient routing. Neither the determination of the most efficient route, nor the assignment of jobs as they come in during the day,

requires a dispatcher to exercise independent discretion"). Here, Mr. Lauer has even less discretion than the dispatchers in *Atlantic Paratrons of New York.* Schedules are pre-determined based on the week and there is no evidence that Mr. Lauer reassigned drivers based on unforeseen issues or varied at all from the set schedule.

In sum, Mr. Lauer composed drafts of the schedules for the northern depot drivers. He considered the most senior drivers' preference for routes, and their familiarity with the routes. Then, the schedule was subject to a supervisor's approval. As noted above, the Board has held that the determination of a driver to a route based on geographic factors and known skills is a routine task, and not indicative of independent judgment. Finally, supervisory approval is absolutely material as they routinely modify Mr. Lauer's recommendations.

(v) Authority to Responsibly Direct

Mr. Lauer does not have the authority to responsibly direct. The Board has held that the term "responsibly to direct" requires the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 691-692 (2006); *NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706 (2011). Here, there is no evidence that Mr. Lauer is held accountable for the actions of other drivers. Indeed, it is clear that his compensation is not impacted <u>at all</u> by the performance of his co-workers.

(vi) Ability to Adjust Grievances

There is no evidence that Mr. Lauer has the authority to adjust even minor grievances. See *Coral Harbor Rehab. and Nursing Ctr.*, 366 NLRB No. 075 (2018). Accordingly, Mr. Lauer does not meet the statutory indicia of adjusting grievances.

(vii) Secondary Indicia – Use of an Office/Computer

Mr. Lauer used an office at the Alanson Depot on some Tuesdays to compose a draft schedule. Other drivers also used the office as needed. Mr. Lauer also was among several lead drivers, including Jeff Johnson, who was assigned a laptop. Mr. Lauer used the laptop computer to compose the draft schedule. Other drivers also used the laptop, primarily for online coursework, in the office in the Depot.

Indicia other than those enumerated in Section 2(11) are secondary indicia. Secondary indicia are not dispositive and are insufficient, standing alone, to establish supervisory status. *St. Francis Medical Center-West,* 323 NLRB 1046 (1997). The Board has held that the authority to grant or deny time off is secondary indicia of supervisory status, which absent primary indicia of supervisory status is not dispositive. *A.D. Conner, Inc.*, 357 NLRB 1770, fn 31 (2011); *Pacific Coast M.S. Indus. Co.*, 355 NLRB 1422, fn. 13 (2010); *Sam's Club* 349 NLRB 1007, 1014 (2007); *Monarch Fed. Saving & Loan*, 237 NLRB 844 (1978); *Flexi-Van Service Ctr.*, 228 NLRB 956 (1977).

Access to an office, along with other statutory employees, or, the assignment of a laptop computer an employee uses along with other statutory employees, are not primary indicia of supervisor status enumerated in the Act. It is not clear that it even amounts to secondary indicia given that <u>all</u> of the drivers in the Alanson Depot had access to both the office and the laptop. What is clear is that since the GC has failed to

establish that Lauer is a supervisor under **any** of the enumerated indicia, his access to an office and to a laptop does not establish he was, or is, a supervisor.

B. The ALJ Appropriately Permitted Evidence Relevant to Lauer's Supervisory Status.

At the evidentiary hearing, the GC made a motion in limine seeking a ruling that all of the issues and facts ruled upon by ALJ Michael Rosas in a March 2, 2017 decision including those as to Mr. Lauer's supervisory status be accepted for purposes of this matter. [T. p. 8]. It is worth considering the validity of ALJ Rosas' determination as it is not supported by law or fact. ALJ Rosas determined:

> The Company [...] contest[ed] his status as a Section 2(11) supervisor. The weight of the credible evidence strongly suggests otherwise. In contrast to the other lead drivers, Lauer exercised independent judgment in assigning, approving and changing the schedules of 25 drivers in the northern depots just like Quisenberry did in the southern territories. The filing of the paperwork at the Grand Rapids facility was merely perfunctory. Lauer also hired and terminated temporary drivers as necessary. In essence, he was the only Company representative in the northern territories and it is clear he represented its interests as only a supervisor would. See *Dean & Deluca New York, Inc.*, 338 NLRB 1046 (2003) (the lack of other supervisors on site is a significant considering [*sic*] a lead employee's supervisory status). [JD 15-17, p. 27]

However, as explained above, ALJ Rosas' factual assertions are demonstrably inaccurate. ALJ Rosas also misstates the law. In *Dean & Deluca New York*, there were no lead employees at issue. Furthermore, the ALJ found that the hardware department manager, who was "in charge" of the store on Saturdays, and a maintenance manager, who was "in charge" of eight to ten employees, were supervisors under the Act. The Board overturned the ALJ's determination noting that the "mere fact that [the employees were] in charge of the store on Saturdays would not establish that [they] excercised supervisory authority during that time." *Dean & Deluca New York, Inc.*, 338 NLRB 1046,

1047 fn. 13 (2003); see also *Billows Electric Supply*, 311 NLRB 878, 879 (1993) (fact that individual was in charge of operations on alternating Saturdays not sufficient to establish supervisory status since no evidence that individual 'exercised authority requiring independent judgment as required by Section 2(11) of the Act'). The Board has long held the ratio of supervisors to employees is not determinative. *Wash. Post Co.*, 254 NLRB 168, 193 (1981). As such, ALJ Rosas' conclusion that the absence of a titular supervisor in Alanson is evidence that the lead driver was a statutory supervisor has no legal support. [JD 15-17, p. 27]. Beyond that, the conclusion has no factual support as Mr. Lauer did not evaluate the performance of drivers in Alanson, or other depots, as that supervisory function was accomplished by actual supervisors who monitored Telogis, STS, or drive cam data and accomplished "ride alongs" with all of the drivers. [T. pp. 209-211, 285]. Thus, the GC is asking for deferral to a flawed decision likely to be overturned by the Board.

ALJ Goldman appropriately determined that while he would not re-litigate the matter which was the subject of ALJ Rosas' decision, he would permit the presentation of evidence distinct in "time" and "quality" in this matter. [T. pp. 14-15]. ALJ Goldman expressly noted that ALJ Rosas' decision was currently under review at the Board. [Id.] As a matter of law, this ruling is appropriate for a number of reasons. First, it is the ruling of the ALJ and impacted the presentation of evidence at the hearing. Second, because ALJ Rosas' findings are indeed the subject of review at the Board, they do not constitute a "final judgment." The Board has recently determined that issue preclusion shall not apply where the issues or facts previously determined were not the subject of a "final judgment" and as relevant here, that would mean the Board had not "denied a

request for review." *Wolf Creek Nuclear Operating Corp.*, 2017 NLRB LEXIS 162, *3-4 (2017). Here, the Board has accepted review of ALJ Rosas' decision and that review is underway. Third, the GC relied upon *Wynn Las Vegas, LLC*, 358 NLRB 690, n.1 (2012) in support of his position. However, *Wynn* was invalidated by the *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014) decision as it was decided by a panel including members Block and Griffin. Finally, the current matter includes "new material facts" concerning the employee whose supervisory status is disputed both in time and quality as the facts presented focus on the duties and authority of Mr. Lauer in 2017, not 2014 and 2015 which is the sole focus of ALJ Rosas' decision. For example, Mr. Lauer did not testify in ALJ Rosas' hearing. Further, evidence of his authority and actual participation in meetings with PMP employees demonstrate that he ceased the practice in June of 2017 months before the alleged August 2017 unfair labor practices, he had no authority to conduct performance evaluations and no authority to, or accomplishment of, employee hiring, discipline or termination in August 2017. Further, his actual authority to "schedule" drivers was defined in material fashion. As the Board held in *Wolf Creek*, issue preclusion is inappropriate where new material facts are presented. *Wolf Creek*, 2017 NLRB LEXIS 162, *8 n.3 (2017). There, the Board cited with approval its decision in *Film & Dubbing Productions, Inc.*, 181 NLRB 583, 583 n. 1 (1970). There, the Board held "it [the NLRB] was not thereby precluded from again considering the status of (employees) as it may appear in the present record thus indicating a discerned change in circumstances apparent from the record before it." Id. The Board continued, "Indeed, new material facts concerning the location and supervision of translators were presented in *Film & Dubbing*." Id; see also *Cement Transport, Inc.*,

162 NLRB 1261, 1266 fn. 11 (1967) (prior decision on employee status did not preclude the Board from a redetermination).

Here, Sysco Grand Rapids has presented new and material evidence that establishes on this record, without a doubt, that Mr. Lauer was not a supervisor in August 2017 and is not a supervisor now. Similarly, and for the reasons recited by the Board in the previous cases, he is not an "agent" of the Respondent under §2(13). He was never approached or addressed as a supervisor. Beyond that, there was no evidence elicited that Mr. Lauer's co-workers considered him authorized to speak for his supervisors in Grand Rapids. Plainly, this evidence would have stood out as the GC insists that Mr. Lauer is a statutory supervisor and therefore empowered to speak on behalf of the Company regardless of whether a supervisor authorized him. Finally, there is no evidence Sysco Grand Rapids did, in fact, authorize him to speak or on behalf of the corporation. The GC insists that ALJ Goldman should not consider this evidence for precisely this reason—because it would result in the dismissal of the current charges. However, the role of the ALJ is not to exclude truthful evidence to substantiate a baseless allegation by the GC. The role of the ALJ is to determine the actual relevant facts and apply them to the law. Here, that function compels a determination that Mr. Lauer was not a supervisor in August 2017.

Finally, as noted by Sysco Grand Rapids at the hearing, Rule 201 of the Federal Rules of Evidence does not permit judicial notice of facts in dispute. *Wyatt v. Teshune*, 315 F.3d 1108, 1114, n. 5 (9th Cir. 2003). For obvious reasons, the relevant finding of ALJ Rosas is in dispute and under review at the Board, and here.

2. SYSCO GRAND RAPIDS DID NOT IMPLICITLY THREATEN ITS EMPLOYEES; THE EVIDENCE DOES NOT SUPPORT A FINDING OF § 8(a)(1)

In paragraph 11, the GC alleges that Sysco Grand Rapids violated § 8(a)(1) of the Act by "implicitly threaten[ing] that it would enforce its rules more strictly" as a result of representations by Mr. Lauer during a gathering of employees who were discussing the Union as inspired by a review of the bright pink union flyer (GC-2).[3] It is not clear which statement that the GC was relying on to establish a violation of the Act, which in and of itself should establish that the GC's evidence does not support a violation of the Act.

Mr. Evoy testified that Mr. Lauer "made a reference to a couple of our employees [...] who were good performing employees and with regards to company policies. If some policy may have been violated by somebody that the company liked, because, like for example, if I bust my ass, I do my job, I bust my ass, if I screw up the company is likely to work with me to get though any disciplinary process on that." [T. p. 42] Mr. Evoy also testified that Mr. Lauer mentioned another former employee, Mark Larson, who had been terminated. According to Mr. Evoy, Mr. Lauer said that Mr. Larson had to be "fired along with the other two employees because if they would have kept him and not the other two, then the Union would have made a deal out of it because everybody wasn't treated the same." [T. p. 43] Mr. Evoy's testimony is utterly uncorroborated, even by the GC's own witness, Mr. Enos. Both Mr. Schlappi and Mr. Lauer testified that Mr. Lauer did not say anything about the disciplinary process in a unionized facility or Mr. Larson's discipline. [T p. 264; T. p. 290]. In fact, Mr. Schlappi, who was an employee of

[3] If the GC alleges any different foundation for the § 8(a)(1) allegation, the Respondent will seek leave to file a Reply Brief. Sysco Grand Rapids objected to this use of evidence on the basis the evidence was not alleged. That objection was denied. [T. p. 41; 76]

PMP, was the only person who ever offered an opinion about unions during the conversation. As the GC has the burden of proof and credibility, this allegation should be dismissed as it is uncorroborated. See *Central National Gottesman*, 303 NLRB 143, 145 (1991) (finding the General Counsel did not meet its burden of proof because the testimony that the allegation occurred was equally as credible as the testimony that denied the allegation); *Burger King & Workers Organizing Comm.*, 2018 NLRB LEXIS 46, 13-14 (2018).

Further, even if Mr. Lauer had stated that Sysco Grand Rapids would have to treat all employees alike in a unionized setting, this statement is not unlawful. In *Trash Removers, Inc.*, a supervisor told employees that his past favored treatment of two employees would have to stop under a union contract because a union demands that all its members be treated alike. Instead, the supervisor said that he would have to "go by the book." The Board found that this statement did not arise to the level of a violation of the Act. *Trash Removers, Inc.*, 257 NLRB 945 (1981). Similarly, in *Beverly Enterprises, Inc.*, the Director of Nursing told employees that she would no longer be able to treat employees like individuals, and would have to "go by the book." The Board dismissed this allegation noting that simply pointing out the fact that employees would deal with the employer under a union contract is a "mere fact of industrial life," and not coercive. *Beverly Enters., Inc.*, 322 NLRB 334, 344 (1996). Similarly, here, to the extent that Mr. Lauer was saying that employees could not receive special treatment, he would be merely pointing out a fact of industrial life, and his statement would not be coercive.

In *Miller Industrial Towing Equipment*, the Board found that the employer's statement that the employer's flexibility in enforcing its policies under a union contract

would be curtailed did not violate Section 8(a)(1) of the Act. The Board noted that it is important to not only examine the statement, but the response. In response to the employer's statement, an employee stated, "You're right, that's why we want a union, we want a contract, we want everything written down so you can't change policy." The Board found that the employee expressly understood the employer's point, and as such, the statement was not coercive. *Miller Indus. Towing Equip., Inc.*, 342 NLRB 1074, 1076-1077 (2004). Similarly, here, in response to the alleged statement, Mr. Evoy said, "I felt everyone should be treated the same. The company guidelines are the company guidelines. Everybody should have equal treatment [...] [I]f a policy is made, it should be applied to everybody equally." Mr. Evoy expressly understood any alleged point that Mr. Lauer was making; e.g., that flexibility would be restrained, and the statement was not coercive. Accordingly, Complaint ¶ 11 should be dismissed.

Second, in support of paragraph 11, the GC solicited testimony about an alleged speech by Mr. Lauer. On the record, it is evident that the vague allegations in paragraph 11 refer to speech ultimately attributed to Mr. Lauer by Mr. Enos to the effect of:

> "... there was discussion ... about how the Unions don't ever do anything for people, how we're wasting our time."

[T. p. 77].

However, no witness even testified Mr. Lauer uttered the speech.[4] Even Mr. Enos does not specifically attribute the comments to Mr. Lauer. Rather, Mr. Schlappi testified he made comments, in front of Mr. Evoy, and with Mr. Lauer present, where he stated he had opted out of the union because they "didn't do me no good." [T. pp. 263-

[4] Dean Enos responded to questions affirmatively that Lauer engaged in saying that supporting the union was a waste of time and unions would never do anything for them. [T. p. 91]. He went on to testify those statements made him extremely uncomfortable and he stopped wearing his Teamsters hat for two days. [T. pp. 92-93].

264]. As such, the allegations are actually against Mr. Schlappi, a statutory employee who at the time worked for another employer, PMP.

Even if Mr. Lauer was a supervisor, and even if he had uttered the speech, the speech would not violate the Act.

First, the ALJ prohibited testimony regarding whether organizing activity was ongoing at the time Mr. Evoy testified he placed GC-2 on a table in the Alanson depot. [T. p. 47]. However, whether the alleged speech was made, and made in the context of an organizing effort, is highly relevant. *See*, *The Developing Labor Law*, Ch. 6.II.B.2.a.[5]

More importantly, the language alleged falls far short of establishing that the "employer either expressly, or by clear implication, [stated] that it would not bargain in good faith with a union even if it were selected by the employees." Id., *citing*, *American Greetings Corp.*, 146 NLRB 1440, 1445 n.4 (1964).

Here, Mr. Lauer allegedly stated that supporting the union was a waste of time and the unions would not do anything for the employees. The Board has held those statements, by a supervisor, even in an organizing campaign, do not establish a § 8(a)(1) violation.

> For example, Holsten admitted telling George Port, a well-known organizer, that there was "just no way we could see where a union could help a sales representative." Holsten's comment concerning the wisdom of opting for Union representation, suggesting that because of the nature of their duties, sales representatives could not benefit from a union, made after Port initiated a conversation about the subject, falls far short of the kind of statements that the Board has determined are section 8(a)(1) violations. See *American Greetings Corp.*, 146 NLRB 1440; *Dal Tex Optical*

[5] It is plain that GC-2 itself establishes an organizing effort was not underway in August 2017. The flyer by its own terms discusses the Union's anticipation of a bargaining order and that it was demanding negotiation with Sysco Grand Rapids – not a representational election.

> *Co.*, 137 NLRB 1782 (1962). I therefore conclude Respondent did not violate Section 8(a)(1) as alleged.

Brooklyn Queens Cable, 1995 NLRB LEXIS 244, *112-113 (1995).

Here, Mr. Evoy and Mr. Enos testified that they initiated a conversation about the union. Enos testified the employees discussed how unions had not helped them. Mr. Schlappi testified he had opted out of a union as it never helped him. And in this context, Mr. Lauer allegedly expresses wonderment about why the employees would support a union as it would not help them. This would not be a violation of the Act even if he was a supervisor.

3. SYSCO GRAND RAPIDS HAS NOT THREATENED TO ADJUST ENOS' SCHEDULE TO RETALIATE AGAINST WEARING A TEAMSTERS HAT

In paragraph 12 of the Region's Complaint (GC-3), the GC alleges that Mr. Lauer threatened to – and actually confirmed he had – changed Mr. Enos' schedule to retaliate against him for wearing a Teamsters hat. He did not.

Mr. Enos testified that in a conversation on or about August 22, 2017 with Mr. Lauer and Mr. Ware, he asked Mr. Lauer why – in a currently posted schedule – he was getting a day off in the middle of the week instead of having a full day weekend. [T. p. 71]. Mr. Enos concludes, "and that was when he mentioned the hat I'd been wearing." [T. p. 71]. Critically, it was in this conversation that Mr. Enos alleges he mentioned he was able to work on Friday nights because he was a Sysco Grand Rapids employee and not a temporary PMP employee like Mr. Ware. [T. p. 70]. Specifically, Mr. Enos testified he complained to Mr. Lauer that he was only "getting 5 days of work." [T. p. 71].

The reality is that Mr. Enos was getting as much time scheduled as any other driver. [R-2]. In the schedule for the week ending September 2, 2017, Mr. Enos was, in

fact, scheduled for 5 days of work. [R-2; R-2688]. However, no employee was scheduled for 6 days. [Id.] Mr. Evoy was scheduled for four days. Mr. Schlappi was laid off after one day of work. Mr. Enos and Mr. Ware were both scheduled 5 days. The difference is that Mr. Ware had requested Friday September 2 off to go camping with his daughter. [T. p. 253]. Both Mr. Lauer and Mr. Yocum confirmed this. [T. p. 293 & p. 223]. It was only after the schedule had been posted that Mr. Enos requested Fridays off so he could have Friday and Saturday off **if** he didn't get 6 days of work scheduled. [T. p. 293]. After Mr. Enos made this complaint, Mr. Lauer recommended schedules where Mr. Enos did get Friday and Saturday off, but still had as many days – or more – scheduled than any other driver. [R-2].

Mr. Ware is not and has never been employed by Sysco Grand Rapids [T. p. 205]. Contrary to Enos' testimony, Mr. Ware never heard Mr. Lauer tell Mr. Enos he would not be scheduled on a certain day because of his Teamsters hat. [T. 253-254] See, e.g, *Virginia Holding Corp.*, 293 NLRB 182 (1989) (crediting a disinterested witness where testimony conflicts with a witness with a stake in the outcome).

Mr. Lauer denied Mr. Ware was present when Mr. Enos complained about being scheduled Friday September 2. [T. p. 293]. Similarly, Mr. Lauer testified he never referenced Mr. Enos' hat during that conversation [T. p. 294], but rather, Mr. Enos displayed his hat to Mr. Lauer [T. p. 295] and did so up to four times in an effort to "antagonize" Mr. Lauer. [T. p. 314].

Mr. Yocum did meet with Mr. Enos on August 30 and did hear Mr. Enos complain that Mr. Lauer had threatened him. [T. p. 218; R-5]. However, Mr. Enos reported Mr. Lauer "changed" his schedule. [R-5]. Mr. Enos' schedule was not changed. Moreover,

Mr. Yocum made it clear to Mr. Enos that he issued the schedule, not Mr. Lauer, who only drafted it. [R-5].

Mr. Lauer is not a supervisor. Even if he was he did not threaten or "change" Mr. Enos' schedule. He was being antagonized by Mr. Enos. Why? Because Mr. Lauer was not a union supporter, so Mr. Enos taunted Mr. Lauer by displaying his hat to Mr. Lauer. Regardless, Mr. Lauer did not – and could not – manipulate Mr. Enos' schedule to injure Mr. Enos as only the supervisors set the final schedule. Beyond that, Mr. Lauer did accommodate Mr. Enos' request and recommended he not be scheduled Fridays and Saturdays.

The evidence supporting the allegation is not credible.

CONCLUSION

For the reasons discussed above, Sysco Grand Rapids submits that the record evidence fails to support the allegations in the Complaint, and requires a finding and recommended order that the Complaint should be dismissed in its entirety.

Dated this 26th day of November, 2018.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on this 26th day of November, 2018, I filed a copy of the Brief of Sysco Grand Rapids, LLC with the Division of Judges, National Labor Relations Board using the Board's E-Filing System. I further certify that at the same time, I served a copy of the same on the Counsel for the General Counsel and the Charging Party's counsel of record by e-mail as follows:

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